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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 718

FETTIG CANNING COMPANY, PETITIONER

v.

WILLIAM E. STECKLER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 11–16) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 21, 1951 (R. 17). The petition for a writ of certiorari was filed May 3, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a seizure action brought under Section 304 of the Federal Food, Drug, and Cosmetic Act charging adulteration may be removed to another district for trial.

STATUTES INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301 et seq., provides in part:

> SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has

probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the

same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specifiy a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

* * * * *

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section,

direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: * * *

(e) When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.

(f) In the case of removal for trial of any case as provided by subsection (a) or (b)—

(1) The clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction.

(2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed.

28 U. S. C. 1404 provides as follows:

§ 1404. *Change of venue.*—(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other dis-

trict or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

STATEMENT

Pursuant to Section 304 of the Federal Food, Drug, and Cosmetic Act, the United States filed two separate libels of information in the District Court for the Eastern District of Missouri for the seizure and condemnation of two separate shipments of tomato catsup. Each libel charged that a specified number of cases of tomato catsup were shipped in interstate commerce by the Fettig Canning Company from its plant in Elwood, Indiana, to a designated consignee in St. Louis, Missouri; that the catsup was adulterated within the meaning of Section 402 (a) (3) of the Act by reason of the presence therein of decomposed tomato material (R. 4–7). Pursuant to the libels, the two shipments were seized by the United States marshal in St. Louis, Missouri, where they remain at the present time.

The Fettig Canning Company of Elwood, Indiana, petitioner herein, appeared as claimant, and filed a separate motion in each case requesting that the proceedings be transferred for trial to the United States District Court for the Southern District of Indiana. A memorandum order was entered in each case granting the motion. Each of these orders bears an endorsement of the Assistant United States Attorney for the Eastern District of Missouri to the effect that there was no objection to the transfer of the case (R. 7). Separate orders were also entered by the District Court, respectively dated January 9 and January 11, 1950, directing that the cases be transferred to the District Court for the Southern District of Indiana. Each of said orders contained the following recital disclosing the grounds upon which it was based (R. 8–9):

> * * * and it further appearing that the products involved herein were introduced into interstate commerce in, and therefore that this action might have been brought in, the aforesaid Southern District of Indiana, Indianapolis Division, as provided for in Title 21, Section 334, U. S. C. and is removable under Title 28, Section 1404 of U. S. C. * * *

Thereafter, the two proceedings were consolidated for trial by the District Court for the Southern District of Indiana (R. 10). During the course of the trial the court determined that

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it did not have jurisdiction over the cases and upon its own motion directed that they be remanded to the Eastern District of Missouri, Eastern Division (R. 10–11).

Petitioner filed a petition for a writ of mandamus in the Court of Appeals seeking an order to compel the District Court to retain jurisdiction of the cases until the final adjudication thereof (R. 1–3). Respondent filed an answer to the petition which, after alleging the facts as hereinbefore related, prayed that the relief requested be denied and the petition be dismissed (R. 11) for the following reason:

> The District Court for the Eastern District of Missouri had no power or authority either under 21 U. S. C. 334 or 28 U. S. C. 1404 (a) to transfer these cases to the Southern District of Indiana for trial.
>
> The District Court for the Southern District of Indiana is without any jurisdiction in these proceedings, and it cannot obtain jurisdiction by consent or waiver.
>
> The remand of these cases to the Eastern District of Missouri was proper and in accordance with recognized procedure.[1]

The Court of Appeals affirmed the action of the District Court in holding that the Indiana Court was without jurisdiction, and in remand-

[1] The respondent's answer to the petition for a writ of mandamus does not appear in the record printed for this Court.

ing the cases to the Eastern District of Missouri (R. 16).

ARGUMENT

28 U. S. C. 1404 (a) provides that for the convenience of witnesses, etc., "A district court may transfer any civil action to any other district or division where it might have been brought." Petitioner contends (Pet. 7–8) that, since the contraband articles were introduced into interstate commerce at Elwood, in the Southern District of Indiana, the seizure proceedings could have been instituted there and, hence, that the actions could be transferred there under Section 1404 (a). The fallacy in this view is, as the opinion of the Court of Appeals explains (R. 14), that jurisdiction in cases of this character is not dependent upon where the seizure might have taken place, but is limited to the district in which the article is found and actually seized. Since, therefore, the proceedings could not have been brought in the Indiana District, such proceedings could not be transferred to that District under Section 1404 (a).

The jurisdiction of the District Courts for the seizure and condemnation of contraband articles under the Federal Food, Drug, and Cosmetic Act is prescribed in Section 304 (a) of the Act, which provides that an adulterated or misbranded article may be condemned in any district court "within the jurisdiction of which the article is

found."[2] The statute then provides for the filing of a libel of information and the issuance of a warrant of seizure or monition in accordance with admiralty procedure. If the article is found and seized within the district, the court of that district has the power to enter a decree for the condemnation and destruction of the res in accordance with the provisions in Section 304 (d) and to issue such process as is necessary to effectuate the decree. The Court's jurisdiction to proceed is dependent upon the actual seizure of the article; if the article is not found and seized, there is nothing with respect to which any jurisdiction can be exercised. The proceeding is, therefore, one in rem. The contraband article is considered to be the offender, and the judgment or decree under Section 304 (d) is directed against the property seized. See *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57; *443 Cans of Frozen Egg Product* v. *United States,* 226 U. S. 172.

A proceeding in rem against specific property is local in character. *Casey* v. *Adams,* 102 U. S. 66; *The Willamette,* 53 Fed. 602 (D. Wash.).

[2] It is fundamental concept that inferior Federal Courts have only such jurisdiction as is expressly vested in them by Congress. *Teel* v. *Chesapeake & Ohio Ry. Co. of Virginia,* 204 Fed. 918 (C. A. 6); *United States* v. *74 Cases, etc., C. C. Brand Oysters,* 55 F. Supp. 745 (W. D. S. C.). See, also, *Chicot County Drainage District* v. *Baxter State Bank et al.,* 308 U. S. 371, 376; *United States ex rel. Carapa* v. *Curran,* 297 Fed. 946, 954 (C. A. 2).

A basic fact essential to the exercise of jurisdiction is the court's actual or constructive possession; the res must be actually or constructively within the reach of the court. *United States* v. *Mack*, 295 U. S. 480, 484; *Strong* v. *United States*, 46 F. 2d 257 (C. A. 1); *The Brig Ann*, 3 L. ed. 734. Such a proceeding must necessarily be brought in the court within the jurisdiction of which the article may be found, and where the article may be subjected to the jurisdiction and power of the court. District courts have no jurisdiction of seizure actions in respect to seizures made in a district other than the place where the proceedings are instituted. *Keene* v. *United States*, 3 L. ed. 108; The *Little Ann*, Fed. Cas. No. 8397; *The Octavia*, Fed. Cas. No. 10422, affirmed 4 L. ed. 25; *United States* v. *396 Barrels, etc.*, Fed. Cas. No. 16502; *The Idaho*, 29 Fed. 187 (D. Oreg.).[3]

Section 1404 (a) permits transfer of "any civil action" to a district "where *it* might have been brought." [Italics supplied.] *This* suit could not have been instituted in the Indiana District because the article was not found there and could not be seized there, irrespective of whether *another* suit might have been brought at another time against the same property in that district. This is the view of the court below and

[3] Under general provisions of law a United States District Court cannot issue process beyond the limits of the district. *Robertson* v. *Labor Board*, 268 U. S. 619, 623.

of all the other courts in which the question of removal under Section 1404 (a) has been considered. In *Clinton Foods, Inc.*, v. *Moore,* decided by the Court of Appeals for the Fourth Circuit on April 2, 1951,[4] the court said:

> The condemnation proceedings against the 630 cases of orangeade could not have been brought in any district other than the Southern District of West Virginia, for it was there that the property sought to be condemned was situate. It is well settled that a proceeding in rem against the specific property is local in character and must be brought where the property is subject to seizure under process of the court. * * * Since the suit for condemnation of the 630 cases of orangeade could not have been brought in any other district than that in which they were seized, it is clear that it may not be transferred from that district under the provisions of 28 U. S. C. 1404 (a).

In the Northern District of Ohio in *United States* v. *23 Gross Jars* * * * *Enca Cream,* 86 F. Supp. 824, the court said (p. 825):

> It is true that under Supreme Court decisions this action would be covered by the phrase "any civil action," but, by the clear and unambiguous words of the statute, such civil action cannot be trans-

[4] Since this opinion has not been reported, copies are being filed with the Clerk for the convenience of the Court.

ferred to a district where the action could not originally have been started.

This libel having been brought under favor of 21 U. S. C. § 334, the articles may be condemned "in any district court of the United States within the jurisdiction of which the article is found." Since the articles were found in the Western District of Pennsylvania this action only could be commenced in that district. It could not, under Section 334, have been brought in this district. Since this is so and since Section 1404 (a) may only be used to transfer actions to districts where they could have been brought, it follows that Section 1404 (a) could not be used to transfer this action here.

In *United States v. 11 Cases, etc., Ido-Pheno-Chon,* 94 F. Supp. 925 (D. Oreg.), the libel charged misbranding and adulteration. Claimant made a motion to transfer the case to the Southern District of California. In discussing the applicability of Section 1404 (a), the opinion states (p. 927):

> Title 21, U. S. C. A. § 334 (a) gives the power to transfer a single libel action where the charge is misbranding. But the charge here is adulteration and misbranding. There is no authority here for transfer.
>
> Title 28, U. S. C. A. § 1404 (a) gives power to transfer any civil action to any district where it might have been brought.

> This action could only have been brought in Oregon, because here alone was the res "found." Title 21 U. S. C. A. § 334 (a); Title 28 U. S. C. A. § 1395 (d), New Judicial Code.
>
> Title 28 U. S. C. A. § 1404 (b) provides for transfer of an in rem proceeding from one division of the same district to another division. This is, of course, permissible because the same District Court retains jurisdiction of the res. The provision would be of doubtful validity otherwise. But the language does not permit transfer of a res in judicial custody of one District Court to another, as is sought here.
>
> Since no statutory provision exists, this Court is without power to initiate the transfer. No other District Court has the jurisdiction to hear the cause if transfer issue.

The same question was presented in *United States* v. *91 Packages* * * * *Nutrilite Food Supplement, etc.*, 93 F. Supp. 763 (D. N. J.). In denying the claimant's motion for a change of venue the court said:

> There is no doubt but that the actions under consideration are civil actions, *Ex-Parte Collett*, 337 U. S. 55, * * * but are they such actions as might have been brought in any other districts than those in which they were brought? The answer is, no, because they were brought as actions in rem, and as such could be commenced

> only where the res was found at the time. 28 U. S. C. A. § 1395 (b).

28 U. S. C. 1404 (a) does not create any new original jurisdiction in district courts. If the District Court for the Southern District of Indiana did not have jurisdiction for the seizure and condemnation of goods found in Missouri prior to the enactment of Section 1404 (a), it does not now have such jurisdiction. The reviser's notes which accompany Section 1404 (a) in the current revision of Title 28 of the United States Code explain that—

> Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper.

Prior to its enactment, the application of the doctrine required the dismissal of the suit. *Gulf Oil Corporation* v. *Gilbert,* 330 U. S. 501. Section 1404 (a) substitutes the remedy of transfer for the more drastic remedy of dismissing the action upon the ground of the inconvenience of the forum. See *Ferguson* v. *Ford Motor Co.,* 89 F. Supp. 45 (S. D. N. Y.), affirmed, *Ford Motor Co.* v. *Ryan,* 182 F. 2d 329 (C. A. 2). In all cases in which the doctrine comes into play, however, there must be at least two forums in which the defendant is amenable to process. *Gulf Oil Corporation* v. *Gilbert,* 330 U. S. 501, 507. It is, therefore, apparent that the doctrine of forum

non conveniens, with respect to which Section 1404 (a) is intended to operate, can never be applied to a proceeding in rem which can be brought only in the district of the res.

The language of 28 U. S. C. 1404 (b) supports the view that Section 1404 (a) was not intended to apply to in rem actions. Section 1404 (b) provides:

> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

It is obvious that the second sentence is meant to apply to transfers between divisions in the same district.[5] The very fact that Section 1404 (b) provides specifically for the transfer of in rem actions under certain circumstances from one

[5] The reviser's notes which the Supreme Court considers "obviously authoritative" (*United States* v. *National City Lines*, 337 U. S. 78, 81), state with reference to subsection (b):

"Subsection (b) is based upon section 163 of title 28, U. S. C., 1940 ed., which applied only to the district of Maine. This revised subsection extends to all judicial districts and permits transfers of cases between divisions. * * *"

division to another in the same district shows that Congress realized that such proceedings could not be transferred from one district to another district under Section 1404 (a).

In an endeavor to support its position, petitioner contends (Pet. 5) that the in rem character of a seizure action under Section 304 terminates after the seizure is made, and that, as soon as a claimant appears, the cause becomes an ordinary civil action between the Government and the claimant, citing *443 Cans of Frozen Egg Product* v. *United States,* 226 U. S. 172. That case, however, holds merely that the proceedings do not remain like those in admiralty beyond the seizure by process in rem so as to be subject to appeal as in admiralty; it does not hold that the proceedings lose their in rem character to become actions in personam. The Court distinguished seizures on land from seizures at sea; it did not hold that a seizure is not an in rem action. The proceeding clearly continues as one in rem against the seized property since the judgment is against the contraband article. *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57.

Petitioner argues (Pet. 6) that the statement in the opinion below, to the effect that there is no provision by which a condemnation decree could be made effective beyond the territory of the district wherein the seizure is made (R. 15), is directly refuted by the many actions that have

been transferred under the act. It is true that Section 304 (a) authorizes removal of seizure actions to other districts for trial under certain conditions and that, in such case, Section 304 (f) (2) specifically vests in the court to which the case is removed the powers of the court from which removal was made. It is the Government's position that in such cases, the clear implication is that the decree may be directed to the Marshal in the district where the goods were seized and that he may execute it in that district. However, under the act, the power of a district court to transfer a case to another district for trial is limited to a single proceeding for *misbranding* (not adulteration) under Section 304 (a), and to proceedings pending in two or more jurisdictions involving the same issues which may be consolidated and removed under Section 304 (b). No transfer to another district for trial may be had except within the limits of the authority contained in Section 304.[6]

Since the act confers no authority to consolidate or remove two single adulteration cases brought in the same district, as in the instant case, the court to which the transfer was sought would have no power to enter an effective decree.

---

[6] In the absence of express statutory authority a district court does not have the authority to transfer a case to another district for trial. See cases cited in *United States* v. *74 Cases, etc., C. C. Brand Oysters*, 55 F. Supp. 745 (W. D. S. C.).

The argument that the purpose of Section 1404 (a) is to relieve a defendant from the burdens resulting from a trial at a distant place is, we think, fully met by the opinion below which points out that such a contention has no bearing upon the jurisdictional question involved, and should more appropriately be directed to the Congress. *Ex parte Collett,* 337 U. S. 55, and *United States v. National City Lines,* 337 U. S. 78, cited by petitioner, both involved actions in personam which are transitory in nature; the reasoning of those decisions does not bear upon in rem proceedings.

Similarly, petitioner's contention that the decision in the court below contravenes the decision of the Court of Appeals for the Third Circuit in *Paramount Pictures* v. *Rodney,* 186 F. 2d 111, certiorari denied, 340 U. S. 953, ignores the difference between actions in personam and in rem. The *Paramount Pictures* case arose out of suits for treble damages under the Federal Antitrust laws, and was a transitory action *in personam.* In cases of that general character, it is elementary that the venue statutes confer upon the defendant merely a personal privilege or exemption which he may assert or waive at his election. *Neirbo Co.* v. *Bethlehem Shipbuilding Corporation,* 308 U. S. 165. As we have shown, however, in actions of the character involved here, the locus of the res is the essential fact which fixes jurisdiction, and the decisions dealing with

transitory actions do not apply. As this Court said in *Casey* v. *Adams,* 102 U. S. 66, 67–68:

> The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem,* and are to be prosecuted where the thing on which they are founded is situated.

The court below was clearly correct in holding that the Indiana Court never acquired jurisdiction of the subject matter involved, and that the parties' consent to venue was without effect. The asserted conflict does not exist.

CONCLUSION

The case was correctly decided below. It presents no conflict of decisions and is based upon a rule which is universally accepted. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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